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Original Action No.

IN THE

Supreme Court of the United States

October Term, 1942

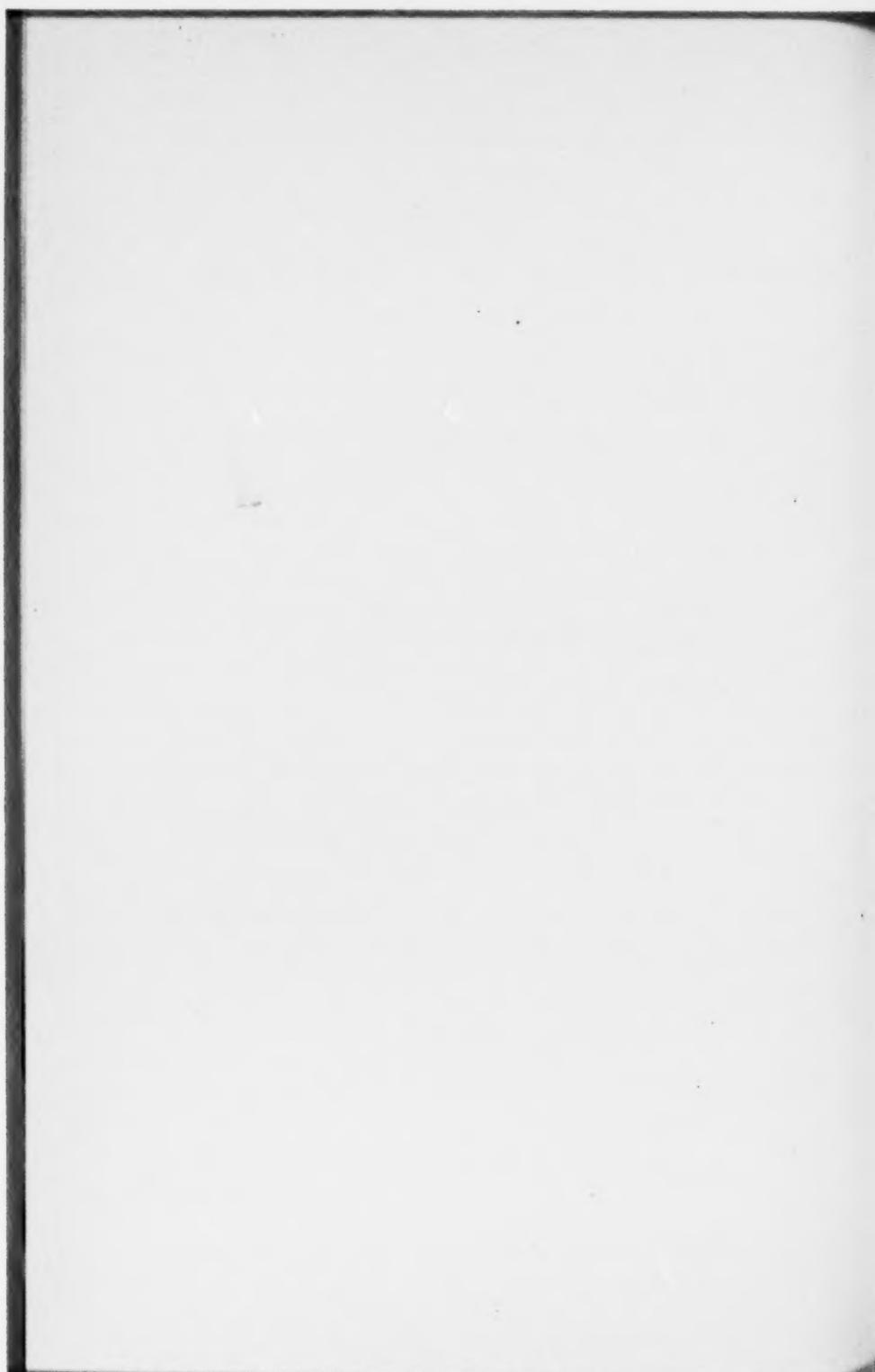
No.

MARTIN M. GOLDMAN and JACOB P. SHULMAN,
Petitioners,
against

SIDNEY C. MIZE, United States District Judge for the
Southern District of Mississippi,
Respondent.

**MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF MANDAMUS, PETITION FOR
WRIT OF MANDAMUS AND BRIEF
IN SUPPORT THEREOF**

JACOB W. FRIEDMAN,
Attorney for Petitioners,
170 Broadway,
New York, N. Y.



I N D E X

	PAGE
Motion for Leave to File Petition for Writ of Mandamus	1
Petition for Writ of Mandamus	4
"Exhibit A".—Order to Show Cause and Affidavits	11
"Exhibit B".—Letter, dated Jan. 26, 1943, Judge S. C. Mize to Jacob W. Friedman and Warren G. Fielding	15
"Exhibit C".—Order, dated Jan. 26, 1943, by Judge Sidney C. Mize	18
Petitioners' Brief in Support of Motion for Leave to File Petition for Writ of Mandamus and in Support of Said Petition	19
Jurisdiction	20
The Issue	21
Argument	21
I	21
II	23
III	24
IV	25
Conclusion	29

TABLE OF CASES CITED

	PAGE
Ackerson v. United States (C. C. A. 2), 15 F. (2d) 268	23
Chicago & A. R. Co. v. Wiswall, 23 Wall. (90 U. S.) 507, 23 L. Ed. 103	20
Ex Parte Cutting, 94 U. S. 14, 24 L. Ed. 49	20
Escoe v. Zerbst, 295 U. S. 490, 79 L. Ed. 1566	23
Frad v. Kelly, 302 U. S. 312, 82 L. Ed. 282	23
In re Grossmayer, 177 U. S. 48, 44 L. Ed. 665	21
In re Hohorst, 150 U. S. 653, 37 L. Ed. 1211	21
Los Angeles Brush Mfg. Corp. v. James, 272 U. S. 701, 71 L. Ed. 481	20
McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762	21
In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738	21
Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853	21
United States v. Goldstein (C. C. A. 8), 271 F. 838	22
United States v. Murray, 275 U. S. 347	2, 23, 24
In re Winn, 213 U. S. 458, 53 L. Ed. 873	20

STATUTES CITED

United States Code, Title 11, Sec. 52 (b)	5
United States Code, Title 18, Sec. 88	5
United States Code, Title 28, Sec. 22	2, 21, 25
United States Code, Title 28, Sec. 342 (Judicial Code, Sec. 234)	2, 20

AUTHORITY CITED

Bill to Amend Judicial Code, United States Senate, 77th Congress, Second Session, on S. 2655	26
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**MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF MANDAMUS**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and to the Associate Justices of the
Supreme Court of the United States:*

Your petitioners, by this motion, ask leave to file in this Court the annexed petition seeking a writ of mandamus to compel the respondent, United States District Judge for the Southern District of Mississippi, to assume jurisdiction on the merits of an application heretofore made to him by your petitioners for a reargument, rehearing and reconsideration of his order and ruling made in New York on July 26th, 1940, then denying their motion

for a suspension of the execution of a sentence of imprisonment and for their admission to probation. The said application was denied by respondent at Jackson, Mississippi, on or about January 26th, 1943, by order filed in the Southern District of New York on or about January 29th, 1943, which denial was expressly predicated upon lack of jurisdiction in the respondent by reason of his absence from the Southern District of New York and the expiration of his designation for that District.

Motion for leave to file the annexed petition is based upon the supervisory authority of this Court to issue writs of mandamus to the district courts of the United States in cases warranted by the principles and usages of law, in accordance with United States Code, Title 28, Sec. 342 (Judicial Code, Sec. 234).

This motion is made and the petition annexed hereto is presented to this Court since it is believed to involve an improper and erroneous failure and refusal to assume jurisdiction on the merits, which error can be effectively remedied only by an application to this Court for an interpretation of the statute relating to assigned judges and their powers, to wit, United States Code, Title 28, Sec. 22.

Your petitioners are presently incarcerated in the Federal Detention Headquarters, in New York City, and have been so incarcerated since February 5th, 1943, but have not yet elected to commence execution of their sentence, believing that such election would foreclose all right to probation, under the rule of *United States v. Murray*, 275 U. S. 347, 359, 72 L. Ed. 309.

In short, a situation is presented wherein two defendants are presently deprived of their liberty although the trial judge, respondent herein, is disposed to grant them probation on the merits but has ruled that he technically lacks jurisdiction to grant this relief.

The remedy by appeal is ineffective, first, because of a question of the appealability of the order (which is an order, in one aspect, denying reargument and intrinsically

declares itself to be a nullity); second, because of the delay incident to that procedure; and, finally, because of petitioners' inability to obtain a stay pending appellate review. The attendant circumstances are more fully detailed in the annexed petition and brief, which your petitioners respectfully request leave to file and which, by this reference, are made a part hereof for the purposes of this motion.

Dated New York, N. Y., March 6th, 1943.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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SIDNEY C. MIZE, United States District Judge for the
Southern District of Mississippi,
Respondent.

PETITION FOR WRIT OF MANDAMUS

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and to the Associate Justices of the
Supreme Court of the United States:*

Your petitioners, Martin M. Goldman and Jacob P. Shulman, respectfully pray for a writ of mandamus directed to respondent, the Honorable Sidney C. Mize, United States District Judge for the Southern District of Mississippi, ordering and directing respondent to assume jurisdiction on the merits of an application made to him on January 25th, 1943, by your petitioners for a reargument, rehearing and reconsideration of his order and ruling made in New York on July 26th, 1940, then

denying their motion for a suspension of the execution of a sentence of imprisonment and for their admission to probation. The January, 1943, application was denied by respondent at Jackson, Mississippi, on or about January 26th, 1943, solely for lack of jurisdiction in respondent by reason of his absence from the Southern District of New York and the expiration of his designation for that District. The pertinent proceedings will hereinafter be more particularly described.

In support of said petition, your petitioners show:

I

On or about July 26th, 1940, your petitioners and one Theodore Goldman (a brother of petitioner Martin M. Goldman), all of them members of the bar of the State of New York, were convicted after plea of not guilty, in the United States District Court for the Southern District of New York, of the crime of conspiring, contrary to the provisions of United States Code, Title 18, Sec. 88, to commit an offense against the United States by attempting to obtain money for acting or forbearing to act in a bankruptcy proceeding in violation of United States Code, Title 11, Sec. 52(b). The trial consumed about ten days and was had before respondent, a judge of the United States District Court for the Southern District of Mississippi, sitting by assignment at that time in the Southern District of New York. Each of the defendants testified at length. The sentence of each defendant, which was imposed immediately upon the rendition of the verdict, was eighteen months imprisonment and a fine of \$25.00, which was remitted. Respondent forthwith denied defendants' application to suspend the execution of the sentence and to admit them to probation. All the defendants were admitted to bail pending appeals thereafter taken to the Circuit Court of Appeals for the Second Circuit and to the Supreme Court of the United States.

II

The judgment of conviction was thereafter affirmed on appeal, finally by the Supreme Court of the United States (316 U. S. 129, 86 L. Ed. 1322), with Mr. Justice Murphy reading a dissenting opinion, the Chief Justice and Mr. Justice Frankfurter filing a dissenting memorandum and Mr. Justice Jackson not voting.

III

During and after the pendency of the proceedings in the Supreme Court of the United States, all three of the defendants made several applications to Judge Rifkind, in the Southern District of New York, to be admitted to probation, which applications were denied, with the exception that on or about October 23rd, 1942, the application was granted as to defendant Theodore Goldman only and denied as to your petitioners. Judge Rifkind, who had previously declared that petitioners made out "a good case for abbreviation of sentence," said further on the argument of the last application on October 20th, 1942, "I do not mind stating to you very frankly that the chief obstacle that I have had in overcoming in this case is that it was not tried before me, and that consequently I have not the feel of the facts which I would otherwise have * * * I thought that I might get some aid out of the correspondence with Judge Mize, but I received no aid from there in that direction." Thereafter, on or about December 21st, 1942, after respondent had stated in a letter that if the matter were before him then, he would grant probation as to petitioners, Judge Rifkind indicated that he would not entertain another application on petitioners' behalf. Solely on the basis of that refusal Judge Bright, of the Southern District of New York, denied a like application on December 31st, 1942, with the result that your petitioners at no time had an adjudication on

the merits which gave consideration to respondent's letter and favorable recommendation. Incidentally, Judge Riffkind's refusal to entertain a further application proceeded on the ground that respondent's recommendation was based mainly on events that had occurred since the trial.

IV

On or about January 13th, 1943, your petitioners obtained at Jackson, Mississippi, an order from respondent directing the United States Attorney for the Southern District of New York to show cause at Jackson, Mississippi, on January 25th, 1943, why your petitioners should not be granted a reargument, rehearing and reconsideration of respondent's original order denying their motion for a suspension of the execution of sentence and their admission to probation. A copy of this order to show cause and of the affidavit on which it was granted is hereto annexed and marked Exhibit A. The moving papers aforesaid were duly served on the said United States Attorney on January 18th, 1943. The United States Attorney filed no affidavit in opposition but merely communicated with respondent by letter in lieu of a brief.

V

On or about January 26th, 1943, respondent rendered an opinion, in the form of a letter, denying and dismissing the application for want of jurisdiction. A copy of this opinion is hereto annexed and marked Exhibit B. Simultaneously, respondent signed an order to like effect, which was filed in the office of the Clerk of the United States District Court for the Southern District of New York on or about January 29th, 1943. A copy of this order is hereto annexed and marked Exhibit C.

VI

On the following day, January 30th, 1943, your petitioners filed notice of appeal to the Circuit Court of Appeals for the Second Circuit, and on February 1st, 1943, applied to that Court for a stay pending the appeal. The application was denied off the bench (by Learned Hand, P. J., and Chase and Frank, J.J.), without prejudice to a renewal, provided your petitioners submitted to imprisonment in the meantime. On February 5th, 1943, your petitioners surrendered to the United States Marshal at New York and since that date have been continuously imprisoned. At present they are prisoners in the Federal Detention Headquarters in New York City. At no time, however, have they elected to enter upon the execution of their sentences. The motion for a stay was renewed in the Circuit Court of Appeals on February 8th, 1943. The Court (then consisting of Swann, Augustus Hand and Chase, J.J.) declined to refer the motion to the previous bench and summarily denied it.

VII

Thereafter, on due notice to the Solicitor General of the United States, your petitioners applied to the Chief Justice of the United States to be admitted to bail. On or about February 17th, 1943, the Chief Justice notified petitioners' counsel in writing that he would not grant bail, but that your petitioners were free to apply for mandamus if they were so advised.

VIII

There is filed herewith petitioners' brief in support of this petition, the burden of which is to the effect that respondent has full jurisdiction to pass upon the application on the merits.

Wherefore, your petitioners pray that there issue out of this Court a writ of mandamus directed to respondent ordering and directing respondent to make and enter an order determining on the merits the application for probation heretofore made to him by these petitioners in the action in the United States District Court for the Southern District of New York, entitled Criminal C-107-2, United States of America against Martin M. Goldman, Theodore Goldman and Jacob P. Shulman, Defendants, and granting to your petitioners such other and further relief as equity and justice require.

Dated, New York, N. Y., March 6th, 1943.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK
CITY AND COUNTY OF NEW YORK } ss.:

JACOB W. FRIEDMAN, being first duly sworn, deposes and says:

That he is an attorney-at-law duly admitted to practice before the Supreme Court of the United States of America, and has his office at 170 Broadway, New York, N. Y. That he is attorney for the petitioners herein. That for approximately two years prior to the date hereof he has been attorney for one of petitioners. That the facts in the above-entitled proceeding, and in the foregoing petition for

writ of mandamus, as well as in the motion filed herewith, are within the personal knowledge of affiant. That he has read the foregoing petition for writ of mandamus, motion for leave to file the same and exhibits thereto annexed and knows the contents thereof. That the same are true of his own knowledge, except as to matters which are therein stated on information and belief and as to those matters he believes them to be true. That affiant is personally familiar with the facts involved in this proceeding, as aforesaid, and is more familiar therewith than is either petitioner, and for that reason affiant makes this verification on petitioners' behalf.

JACOB W. FRIEDMAN

Subscribed and sworn to before me
this 6th day of March, 1943.

VIOLA FRIEDMAN

Commissioner of Deeds, City of N. Y.

N. Y. Co. Clk's No. 29, Reg. No. 12 F 3

Kings Co. Reg. No. 3005, Bx. Co. Reg. No. 43F16

Term Expires March 18, 1943

A copy of this petition, the motion for leave to file the same, the exhibits thereto annexed, and a copy of petitioners' brief in support of said petition and motion, all of which have been filed herein, have been duly served upon the Honorable Sidney C. Mize, United States District Judge for the Southern District of Mississippi, respondent herein.

Dated New York, N. Y., March 6, 1943.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

"Exhibit A"**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA
against
MARTIN M. GOLDMAN, THEODORE GOLD-
MAN and JACOB P. SHULMAN,
Defendants.

On reading the annexed affidavits of Martin M. Goldman and Jacob P. Shulman, duly sworn to the 11th day of January, 1943,

Let the United States Attorney for the Southern District of New York show cause before HONORABLE SIDNEY C. MIZE, United States District Judge, at the Federal Courthouse, Jackson, Mississippi, on the 25th day of January, 1943, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein granting the motion of defendants Martin M. Goldman and Jacob P. Shulman for a re-argument, re-hearing and reconsideration of the order and ruling of the HONORABLE SIDNEY C. MIZE, United States District Judge, made on July 26, 1940, denying their motion for a suspension of the execution of sentence and their admission to probation herein, why upon such re-argument, re-hearing and reconsideration their said motion should not be granted and why they should not have such other and further and different relief as to the Court may seem just and proper in the premises, and sufficient cause appearing therefor, pending

the hearing and determination of this motion and the entry of an order thereon,

Let the surrender of the said defendants be and the same hereby is stayed, and

Let service of a copy of this order and of the papers upon which it is granted, on the United States Attorney on or before January 18th, 1943 be deemed sufficient.

Dated, Jackson, Miss., January 13, 1943.

S. C. MIZE
United States District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA <i>against</i> MARTIN M. GOLDMAN, THEODORE GOLDMAN and JACOB P. SHULMAN, <i>Defendants.</i>	C 107-2 Filed January 13, 1943 at Jackson, Miss. S. C. MIZE U. S. D. Judge So. District of Miss.
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STATE OF NEW YORK SOUTHERN DISTRICT OF NEW YORK COUNTY OF NEW YORK	} ss. :
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MARTIN M. GOLDMAN and JACOB P. SHULMAN, being severally duly sworn, depose and say:

We are two of the defendants in the above-entitled action, are familiar with the facts and submit this affi-

davit in support of our motion for reargument, rehearing and reconsideration of our application for probation which was denied by the Honorable Sidney C. Mize, United States District Judge, on July 26th, 1940.

A brief summary of the prior proceedings is as follows: The three defendants above-named were on July 26th, 1940, convicted of conspiracy to violate the Bankruptcy Act. The trial, which consumed about ten days, was had before Judge Mize and a jury. Upon rendition of the verdict each of the defendants was sentenced to eighteen months' imprisonment and \$25 fine, which was remitted. Defendants applied to Judge Mize to suspend the execution of the jail sentence and to admit them to probation and the motion was denied. The judgment of conviction was thereafter affirmed on appeal, finally by the Supreme Court of the United States, with three Justices dissenting and one not participating (316 U. S. 129). Meanwhile the defendants made several applications to Judge Rifkind to be admitted to probation, which applications were denied, with the exception that on or about October 23d, 1942, the application was granted as to defendant Theodore Goldman only. Subsequently, on or about December 21st, 1942, after Judge Mize had stated in a letter that if the matter were before him then, he would grant probation as to the other two defendants, Judge Rifkind indicated within a few days that he would not entertain another application on their behalf. On the basis of this refusal Judge Bright denied a like application on December 31st, 1942, with the result that we have at no time had an adjudication on the merits which gave consideration to Judge Mize's letter and recommendation.

Judge Mize is fully familiar with the facts, circumstances and proceedings bearing upon this application.

No previous application for reargument, rehearing or reconsideration of the aforesaid ruling of Judge Mize has been made herein.

The reason why this motion is made by order to show cause is so that we may obtain a stay. Judge Bright's order has this day set surrender for January 13th, 1943, and all jurisdiction to grant probation terminates with surrender (*United States v. Murray*, 275 U. S. 347, 359). A stay is therefore vital to preserve the jurisdiction of the Court.

WHEREFORE, we respectfully ask for a reargument, rehearing and reconsideration of Judge Mize's aforesaid denial of probation; that upon such reargument, rehearing and reconsideration our motion be granted; and that we may have such other, further and different relief as may be just and necessary in the premises.

MARTIN M. GOLDMAN
JACOB P. SHULMAN

Sworn to before me this 11th }
day of January, 1943. }

VIOLA FRIEDMAN
Commissioner of Deeds,
City of N. Y.
N. Y. Co. Clk's No. 29, Reg. No. 12F3
Kings Co. Reg. No. 3005, Bx. Co. Reg. No. 43F16
Term Expires March 18, 1943

"Exhibit B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

Chambers of
SIDNEY C. MIZE
District Judge

Jackson, Mississippi
January 26, 1943

Honorable Jacob W. Friedman
170 Broadway
New York

Honorable Warren C. Fielding
New York

Honorable Matthew Correa
United States Attorney
New York

Re: United States of America
v.
Martin M. Goldman and
Jacob P. Schulman

Gentlemen:

I have considered carefully your argument and authorities upon the application of the above named defendants for a reconsideration of my decision denying them probation, made while sitting in New York, and have reached the conclusion that I am without jurisdiction to determine this matter. Section 22, Title 28, U. S. C. A., being the Act of March 3, 1911, Section 18 as amended, limits the power of an assigned judge to certain matters specifically men-

tioned in the statute after his return to his own district. He is granted specific authority to decide motions for new trials, settle bills of exceptions, certify narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case tried before him for review in the appellate court.

The above named defendants were tried before me, convicted, sentenced, and probation denied. That was the final judgment. The defendants appealed and their convictions were affirmed. So far as the district judge was concerned, the matter was finally closed, and I, being an assigned judge and having returned to my own district, have no jurisdiction whatever to determine any matter in that case. All matters that were submitted to me in New York have now been decided and were decided prior to the time I left the district. I, therefore, am foreclosed from exercising any other judgment in that case.

The case of *Frad v. Kelly*, 302 U. S. 312, is conclusive upon the above announcements. The court in that case construed the statute to the effect that an assigned judge had the power to perform the functions which are incidental and supplemental to the duties performed by him while present and acting in the designated district, but that the Act goes no further than that; that it does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. The court further held in that case that a criminal trial is concluded by the judgment of sentence entered upon the verdict of guilty, and that while the statute gives him specific authority to hear a motion for a new trial, no authority is given him to hear a new matter, even though it arises in the same case.

An application for reconsideration of a motion for probation which was denied at the time is not a motion for a new trial, and regardless of what the application may be called, it presents new matter. For reasons appearing to the court at the time, the application was denied. The

defendants, after conviction, have been put to a large expense undoubtedly, and during the pendency of the appeal undoubtedly have suffered great humiliation and embarrassment, loss of profits from their profession, and probably if these matters were taken into consideration now, probation would be granted, but it would be upon grounds accruing since the trial terminated in the district court and would constitute new matter, which this court would have no jurisdiction to consider. For this reason the petition will be denied and dismissed.

I am signing an order today and forwarding it to the Clerk of the District Court in New York to be recorded together with the original of this letter, which will be filed with the Clerk and will constitute my opinion upon the question.

Sincerely yours,

S. C. MIZE
S. C. Mize
District Judge

"Exhibit C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MARTIN M. GOLDMAN and
JACOB P. SCHULMAN

Application having been presented to the undersigned district judge, now sitting in Mississippi, for a reconsideration of the application made by the defendants for probation, which had been denied at the time of the conviction of the defendants by the undersigned judge, sitting by assignment in the Southern District of New York, and said application now having been fully considered, it is ordered by the undersigned judge that said application and petition be, and it hereby is, denied for lack of jurisdiction in the undersigned judge; and it is further ordered that the order heretofore made on the 14th day of January, 1943, staying the execution of sentence upon the above named two defendants be and the same hereby is set aside and canceled because of lack of jurisdiction in the undersigned judge to have made same. To all of which action the defendants are granted an exception.

ORDERED, this the 26th day of January, 1943, at Jackson, Mississippi.

SIDNEY C. MIZE
United States District Judge
Southern District of Mississippi

